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No. 16, Original Jurisdiction.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

Bill in Equity Original Jurisdiction. No. 16.

STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,

Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

BRIEF OF ILLINOIS IN SUPPORT OF MOTION TO DISMISS AMENDED BILL.

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STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,

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vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

BRIEF OF ILLINOIS IN SUPPORT OF MOTION TO DISMISS AMENDED BILL.

STATEMENT OF THE CASE.*

This is a bill in equity by four of the ~~seven~~ eight states littoral of the Great Lakes (but not by all) against a fifth littoral state, Illinois. It joins, as defendant, the Sanitary District of Chicago, an Illinois public corporation, and invokes the original jurisdiction of this court, as a suit by states against another state and a citizen thereof. It seeks to regulate the quantity and manner of sewage

*All of the facts recited herein, which do not affirmatively appear from the face of the amended bill, are of such a nature that this Court will take judicial notice of them. (*Jones* v. *United States*, 137 U. S. 202, 212, 215; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Brown* v. *Piper*, 91 U. S. 37, *Jenkins* v. *Collard*, 145 U. S. 546; *Armstrong* v. *U. S.*, 3 Wallace 154.)

disposal by the State of Illinois in the Illinois and Des Plaines rivers and to enjoin, or failing that, to have reduced, a diversion of water from Lake Michigan and the Great Lakes-St. Lawrence system, through a deep, wide and continuous channel—the Illinois-Michigan and the Ship and Sanitary canals—into the Missouri-Mississippi system. The channel is the only link between those systems and a single glance at the map discloses the creation thereby of a great, continuous waterway, from the Gulf of Mexico to the North-Atlantic, which, with its tributary fluvial ramifications, forms a net-like arterial pattern reaching practically every state, province and territory of the United States and Canada, east of the Rocky Mountains: There is here concerned an area, a commerce and an empire so much greater than was ever before possible in a single system of inland waterways that comparison fails of its purpose. This system presents problems and policies of tremendous national and international concern, both economic and political. These waterways are arteries of irrigation, sources of power, highways of commerce, conduits of drainage, and avenues of defense, for two great nations.

The right and interest, in every aspect of this suit, of the littoral states of Michigan and New York, which are not complainants, is in all respects equal to that of the states complainant. No less is the interest and right of every state of the Union and above and controlling all is the paramount and vital right and interest of the nation. The rights and interests failing of representation here are such that no decree can enter without seriously and adversely affecting them. The existence and operation of the canal which have become the subject of this suit are, therefore, of perhaps the greatest national and international importance,

present or potential, of any of the inland artificial works of the United States. The bill asks that its effective use be abated in the tenuous interest of thirty-two (but not of all) "harbors" on the Great Lakes, many of which are little more than landings. It avers no ponderable injury to any of these harbors but prefers a complaint that could be properly based only on an *absolute* right to the *status quo* in what the bill calls the "*natural*" navigable capacity of the Great Lakes.

From the foregoing recitation we must conclude that the entire subject matter of this suit—not only the canal in question but also all of the lakes, rivers, harbors, and waters involved—are among the principal instrumentalities of the interstate and foreign commerce of the United States, and therefore, we would expect to learn that the federal government has already assumed complete control, not only of the diversion of waters through the canal, but of every matter or thing that could possibly bear upon this controversy. And such is indeed the case.

Of the named harbors in the states complainant, Congress has taken every single one under its fostering care and control by various general statutes and regulations controlling navigation on the lakes, by particular "River and Harbor" Acts and by works and improvements therein made by the United States in accordance with an integral plan of river and harbor improvements (see partial list of acts and regulations in apendix I) in such sense as was said by this court in respect of one of them (Duluth), in a case in which one of the states complainant here (Wisconsin) sought to interfere with a diversion of water from its natural channel at Duluth on the same ground it here avers: "* * * We (the United States) take upon ourselves the burden of this improvement which properly belongs to us and that

hereafter this work for the public good is in our hands and subject to our control." (*Wisconsin* v. *Duluth*, 96 U. S. 379.) In the same way it has legislated and acted in respect of the Chicago, Desplaines and Illinois Rivers.

The Federal Government regulates these waters and navigation in the Great Lakes and has assumed to Canada responsibility for acts affecting the levels of the Great Lakes and otherwise (*Treaty of January* 11, 1909, proclaimed May 13, 1910, 36 Stat. at L. 2448).

The particular subjects of dispute—the Michigan-Illinois and the Sanitary and Ship Canals, the diversion of water through them, and their enormous strategic, economic and political importance—have been the objects of concern, encouragement, supervision and control of the Federal Government for more than a century. The water route that later became these canals was very early recognized by two Federal Treaties with the Ottawa Indians (*Treaty of Greenville,* 1795 *and Treaty of* 1816). The act enabling Illinois to organize as a state was amended in 1818 (32 *Annals of Congress,* p. 1677) to add a narrow strip of land, including this route, for the purpose of linking the port of Chicago and the waters of Lake Michigan with the Illinois River by a proposed canal. Acting on engineers' reports of 1819, Congress by Act of March 30, 1822 (3 *U. S. Stat. at L.* 659), authorized Illinois to survey through this strip a route for this canal and reserved public land, ninety feet on either side of said canal, from sale by the United States. Illinois complied with the conditions of this Act of 1822, and on January 20, 1825, Governor Coles wrote to President Monroe, in part, as follows:

"In compliance with request of the Legislature of this State, I have the honor to transmit to you a copy of

the 'Report of the Canal Commissioners of the State of Illinois,' together with a map of the country between the headwaters of the Illinois River and Lake Michigan on which is delineated the proposed canal to connect these navigable waters."

By Act of March 2, 1827 (4 *U. S. Stat. at L.* 234) Congress granted land, "one-half of five sections in width on each side of said canal" to Illinois, for the purpose of "aiding said state in opening a canal *to unite the waters of the Illinois River with those of Lake Michigan.*" Accordingly the State of Illinois in 1836 (Session Laws of Illinois for 1836, p. 98) enacted legislation providing for the construction of the canal, which was completed in pursuance thereof in 1848, substantially on the route of the present Sanitary and Ship Canal and, for a considerable distance, identical therewith. This canal was to be supplied "*with water from Lake Michigan* and such other sources as the canal commissioners may think proper" and was to be constructed in the manner "best calculated to promote the *permanent interest of the country,* reserving ninety feet on each side of said canal to enlarge its capacity." (Section 16, Illinois Act of 1836 *supra.*)

The funds thus jointly provided by Illinois and the United States proved inadequate to the original engineers' plan and the requirements of the Act to provide a depth sufficient to take waters from Lake Michigan by gravity, and water was, for a time, secured for the canal by dams and pumps from the Chicago River. In his message of December 1, 1862, to Congress (Messages and Papers of the Presidents, Vol. 5, p. 3334) President Lincoln called attention of Congress to the "military and commercial importance of enlarging it (the canal)". In 1866 (14 Stat. at L. 7) Congress appropriated funds for a survey of the project of en-

larging it and, on Feb. 12, 1867, the Chief of Engineers reported enthusiastically thereon. In 1871, pursuant to an enabling Act of the Illinois Legislature, Feb. 16, 1865, the State of Illinois deepened this canal on the original plan and at last the objects of the Acts of Congress of 1822 and 1827 (*supra*) were accomplished and water flowed into the canal by gravity from the lake, thus "*uniting the waters of the Illinois River with those of Lake Michigan.*"

This original flow by gravity from the lake was small. In addition to its use and purpose as "a public highway for the use of the government of the United States" (Act of March 30, 1822, *supra*), the City of Chicago was also using the Illinois and Desplaines Rivers, *via* the canal, for sanitary purposes. By 1884, the rapid growth of the city had created, in the lake, the canal and the two rivers just mentioned, a dangerous condition, resulting from sewage disposal. To remedy this condition and to enlarge and improve the waterway, the Illinois Legislature, in 1889 passed an "Act to Create Sanitary Districts and to *Remove Obstructions in the Illinois and Desplaines Rivers*" (Laws of Illinois for 1889, p. 186). Under this act the defendant Sanitary District was created. This Act provided for construction of the canal much in its present form and for greatly increasing the capacity of, and improving, its precedent form. It declared the canal a navigable waterway of the United States under control of the Government for navigation purposes. It contemplated the diversion by gravity of waters from Lake Michigan through the canal into the Illinois and Desplaines Rivers, and the creation of the present great commercial waterway linking the Missouri-Mississippi and Great Lakes-St. Lawrence systems.

It is important to note that, at the time of the pass-

age of this Act, there was no *general* federal statute, controlling navigable waters. Congress by the Acts of 1822 and 1827, *supra,* had authorized and aided Illinois in the construction of a canal "to unite the waters of the Illinois River with those of Lake Michigan." Congress had also kept in constant touch with every development of the original canal as above narrated, by reports and elaborate surveys by the Corps of Engineers, which surveys and reports were appropriated for and required by River and Harbor Acts of 1866, 1875, 1879, 1882, and 1886. These surveys and reports had, without exception, enthusiastically approved the expanding projects of Illinois, as being of the utmost benefit and importance to the navigation, the commerce, and to the navigable waters of the United States. The then state of the law, as established by the decisions and pronouncements of this court, was that, as to improvements and modifications in navigable waters, wholly within the boundaries of a state, the state was free to act subject to the paramount control of Congress (See Point V 2 and 3 *infra*). In this case, both the state, by the Acts of 1836 and 1865, had acted, and by the Act of 1889 was about to act, and Congress, by the Acts of 1818, 1822 and 1827 had authorized the canal, and by necessary implication, the diversion from Lake Michigan to unite its waters with the lower waters of the Illinois River.

Almost upon the heels of the State Act authorizing the present canal and diversion, Congress, by the Act of September 19, 1890, legislated in such fashion as to modify the prior rule and to prohibit obstructions to navigable capacity of the navigable waters of the United States not "*affirmatively authorized by law*" or the alteration or modification of the capacity of said navigable waters of the United States, "*unless approved and authorized by the Secretary of War.*" In the case of *United States*

v. *Bellingham Bay Boom Co.*, 176 U. S. 211, this court held that a *state statute* satisfied the requisite authorization by law. No new duty was therefore as yet imposed upon the State of Illinois by the Act of September 19, 1890, since the state act of authorization and the federal statutes cited satisfied the federal act of 1890.

Construction began in 1893 and proceeded under the constant surveillance of the U. S. Corps of Engineers. (See reports, Chief of Engineers to Congress, for year 1890, elaborately detailing and reporting upon the work projected by Illinois, and for the year 1892 reporting the progress of the work, and for the year 1893, discussing the work in great detail, and for the year 1895 reporting the imminence, amount and effect of the new diversion and the great national importance thereof.) On June 16, 1896, the work had progressed so far that "modification" of the channel of the Chicago River was imminent and the Sanitary District, in compliance with the federal statute, applied for a permit and for the approval of the works constructed, and asked the co-operation of the War Department. The permit and approval of the general plan was granted by the Secretary of War July 3rd, 1896. Other permits covering advancing portions of the work were granted by the Secretary of War, November 16, 1897, November 30, 1898, January 13, March 10 and May 12, 1899. On February 23, 1898, the House Committee of Congress on Rivers and Harbors inspected the works.

Moved apparently by the decision in the *Bellingham Bay* case, Congress enacted the Act of March 3, 1899, which has been repeatedly construed as such an assumption, by the United States, of sovereignty in national navigable waters as to exclude the sovereignty of states and to vest in the federal government the exclusive right to say both what shall and what shall not be done in

respect thereof. The practical effect of this statute is discussed in Points V-3 and VI *infra*.

On April 22, 1899, the work of the canal had progressed so far that the Sanitary District was ready to begin the greatly increased diversion of waters from Lake Michigan through the new and enlarged canal. Accordingly, on May 8, 1899, a permit therefor was issued by the Secretary of War. It recited the necessity under the Act of 1899 for federal authorization for such alterations in navigable capacity as was proposed, the government's previous approval of the works constructed, the extent of the purposed diversion of waters and the consent of the Chief of Engineers and the permission of the Secretary of War for a diversion to operate it.

In the vicissitudes of experience and operation and to accommodate further improvements in the waterway made by Chicago and (in the Chicago River proper) by the United States, modifications of this permit were made by succeeding Secretaries of War in April, July and December, 1901, January, 1903, and June, 1910, the last named permit authorizing the diversion of 4167 cubic feet per second. These permits are all set forth in the bill of complaint and an examination of them will demonstrate that the Chief of Engineers and the Secretary of War were constantly alert to observe the effect of the diversion on navigation and to require modification whenever, and to the extent that, the United States determined that navigation was injuriously affected by acts of the State of Illinois.

During all this time, as is shown by reports to Congress and the Secretary of War (Appendix II), the Chief of Engineers and the Secretary of War exercised constant supervision and surveillance of all that was being done and projected by the defendants. A report (H.

R. document 333, 54th Congress, 2nd Session, March 3, 1897) was laid before Congress showing the depth and width of the canal, its availability as a national waterway and the fact that it would eventually require 600,000 cubic feet per minute and affect the levels of the lakes, the action of Congress thereon was (River and Harbors Act, 1899), to appropriate for and require a report from the War Department, on a project for improvements of the Illinois and Desplaines Rivers, with a view to the extension of navigation by channels 7 and 8 feet deep from the Illinois River to Lake Michigan, at or near Chicago, in pursuance of the recommendations of the report. By Act of June 6, 1890 (31 Stat. at L. 578) estimates of cost of channels 10, 12 and 14 feet deep were called for, including *"connection at Lockport with the Sanitary and Ship Canal constructed by the Sanitary District of Chicago."*

By Act of June 25, 1900 (36 Stat. at L., p. 630) Congress appropriated $1,000,000.00 for the construction of a waterway from Lockport, the southern terminus of the Sanitary and Ship Canal, via the Desplaines and Illinois Rivers to the mouth of the Illinois, and provided for a Board of five members to report upon the feasibility of this waterway, and its most advisable depth and dimensions, upon such measures as may be required to preserve the levels of the Great Lakes from the effects of diversion for maintenance of the waterway or for any other purpose, and upon the influence on volume and height of water in the Mississippi River below Cairo.

By Act of 1902 (32 Stat. at L. 573) Congress provided $200,000.00 for surveys to determine the *feasibility of a channel 14 feet deep from Lockport, via the Illinois, Desplaines and Mississippi Rivers to St. Louis.* This Act addressed itself to the whole subject of the waterway from the Mississippi to and in the Great Lakes, and by

Section 4, provided for the creation of an International Waterways Commission, to make a study and report to Congress upon the regulation and diversion of waters from the Lakes. Members of the Commission appointed under this Act were to co-operate with members of the same Commission appointed by the Government of Canada, and they were to investigate and report upon the boundary waters, upon the maintenance and regulation of *suitable* levels therein, upon the effects of diversion and the necessary measures to regulate such diversion. They were to make recommendations for such improvements and regulation as should best subserve the interests of navigation in those waters.

By Act of June 29, 1906, (34 Stat. at L. p. 626), Congress prohibited diversion of waters from the Niagara River but were express in providing that this prohibition should *not be interpreted as prohibiting the diversion of waters from the Great Lakes for sanitary, domestic or navigation purposes, in amounts fixed from time to time by Congress or "by the Secretary of War of the United States under its direction."* By Act of March 2, 1907 (34 Stat. at L. p. 1703) Congress provided for the appointment of a Board *to survey a channel* 14 *feet deep from St. Louis to the mouth of the Mississippi* and authorized the Board to consider the proposed waterway "from Chicago to St. Louis, heretofore reported," and to determine "what increase of depth will be obtained over the natural flow of water in such regulated channel by an added volume of *10,000* cubic feet per second."

On June 30, 1907 (40 Stat. at L., p. 241), Congress by joint resolution appropriated for and required the Secretary of War to make an investigation of the entire subject of water diversion through the Great Lakes and the Niagara River. The Boards of Engineers reporting, in

pursuance of said Acts, assumed and stated that they assumed, presumably from the history just recited, a diversion of 10,000 feet per second at Chicago through the canal. They recommended the location of a deep waterway along the canal and the utilization of the diversion through the canal in connection with the improvement of the waterway from Chicago to St. Louis.

On January 4, 1907, the International Waterways Commission reported to Congress. Referring to the waterway to and in the Mississippi River, they concluded that "the diversion of 10,000 cubic feet of water per second at Chicago will render practicable the waterway to the Mississippi River 14 feet deep"—the depth contemplated by the latter acts of Congress cited above. The Commission accepted the canal as designed and built, "with its attendant diversion of 10,000 c. s. f." as a "fixed fact" and said that it did not wish to reopen the case. Based upon and guided by this report, the treaty with Canada (Great Britain) of January 11, 1909, discussed in Point V-2 *infra* was negotiated. It preserved the diversion then existing and it undertook obligations to Canada not to disturb the natural levels of the Great Lakes, either by obstructions raising the levels or by further diversion, without approval by an International Joint Commission.

Indeed, a survey of all the administrative and legislative acts of the United States will disclose a carefully considered and deliberate purpose to connect the Great Lakes-St. Lawrence with the Missouri-Mississippi systems, by a project which latterly contemplates and utilizes the canal as it exists and a diversion of 10,000 cubic feet per second from Lake Michigan, as one link in a national and international waterway, connecting the Great Lakes via the Illinois, Desplaines and Mississippi Rivers,

with the Gulf of Mexico, 14 feet deep and requiring to attain and maintain that depth, not only in the canal but also in the rivers below the canal, a diversion of water from Lake Michigan of 10,000 cubic feet per second. There will not be found in all the recent voluminous surveys, reports and deliberations of Governmental agencies, any other or different information or advice to the Secretary of War or to the Congress, and it is impossible to avoid the conclusion that the canal, and the diversion of water from Lake Michigan to that extent, are necessary incidents in this great project of the federal government to improve and regulate this most important segment of the navigable waters of the United States.

In 1908, and in connection with an improvement in the works by opening an additional intake in the Calumet River, a friendly suit was instituted by the United States by a bill filed March 23rd, in the U. S. District Court, for the Northern District of Illinois, Eastern Division, against the Sanitary District, to enjoin reversal of the direction of the Calumet River and the withdrawal of water from Lake Michigan *in a different way or in larger amount than that authorized by the Secretary of War.* Work on the Calumet project was suspended. On June 30, 1910, the Secretary of War granted a permit for withdrawal through the Calumet River but on the express condition that it should not be used in the friendly suit. Work on the Calumet project was then resumed and was completed in 1922. During the month of January, 1913, the United States complained that more water than was authorized by the Secretary of War's permits was being withdrawn through the canal and, at the suggestion of the Sanitary District, another bill of complaint was filed in the same District Court seeking to enjoin the Sanitary District from diverting

water in excess of the amount authorized by the permits (4167 c. s. f.) While these two suits were pending, there was accumulated and placed before the court an exhaustive, imposing and conflicting mass of evidence covering every purpose, aspect and effect of the diversion and requiring years to compile.

It is of the utmost importance to note that the resultant of both of these suits by the United States, after all the evidence was in, did not seek, as does the present bill, to enjoin the diversion of *"any water whatever"* from Lake Michigan. It did not seek, as does the present bill, *to have the court determine* what amount of water is required for navigation through the canal and connecting waters to the Mississippi River *"without injury to the navigable capacity of the Great Lakes and connecting waters"* and to restrain diversion of any excess. It did not seek, as does the present bill, *to have the court determine* what quantity and manner of sewage disposal in these waters would not interfere with navigation and to restrain a greater quantity or a different manner of such disposal. On the contrary, the bill of the United States assumed that Congress and its instrumentalities were vested with exclusive authority to determine these questions and to regulate commerce among the states in respect thereof. The complainant was the United States, suing in its sovereign capacity and its exclusive right on all subjects and questions here involved. The suit was based on an alleged violation, by the state, of a specific determination and order by the United States, and it sought only for a restriction of withdrawal to the amount determined by the Secretary of War to be consistent with the proper regulation of navigation. It asked the court—not to *regulate commerce* as does this bill—but to *vindicate a regulation by Congress.* It did not ask for the abatement of the

diversion and it did not do so for reasons that must be obvious from the facts in the foregoing recital—reasons which were aptly surmised by this court, after referring to those facts, (*Sanitary District* v. *U. S.*, 266 U. S. 405) to be; "* * * This suit is not for the purpose of doing away with the channel which the United States, we have no doubt, would be most unwilling to see closed, but solely for the purpose of limiting the amount of water to be taken through it from Lake Michigan."

On June 18, 1923, the District Court entered a decree as prayed. The Sanitary District appealed to this court which, on January 5, 1925, approved the decree for an injunction as prayed "*without prejudice to any permit that may be issued by the Secretary of War according to law.*" On March 3, 1925, the Chief of Engineers recommended and the Secretary of War authorized, diversion from Lake Michigan, by the Sanitary District, subject to certain conditions, of an annual amount of 8,500 c. s. f. but not to exceed an instantaneous maximum of 11,000 c. s. f. The conditions may be epitomized as follows: No unreasonable interference with navigation—expenses of necessary inspection by the United States in the interests of navigation to be borne by the permittee—no attempt by the permittee to forbid the full and free use of any navigable waters of the United States—the carrying out by the Sanitary District of a specified sewage disposal program—payment by the District of its share of the cost of works to restore or compensate the lowering of levels of the Great Lakes—construction by the Sanitary District before July 1, 1929, on plans to be approved by the Secretary of War, of controlling works to prevent the discharge of the Chicago River into Lake Michigan—program for metering of at least 90% of the water service by the City of Chicago within six months—and most important of all to *this* suit that the "* * *

*diversion of water from Lake Michigan shall be under the supervision of the United States District Engineer at Chicago and * * * under his direct control in times of flood in the Illinois and Desplaines Rivers.''*

All of the conditions of this permit have been fully complied with. This is established by official records, of which this court will take judicial notice. (See appendix I.)

Prior to the decree of this court in *Sanitary District* v. *United States, supra,* and the permit of the Secretary of War of March 3, 1925, *i. e.,* in June, 1925, the State of Wisconsin, had filed here a bill the prayer of which was practically the same as that of the United States in the Sanitary District case. As soon as practicable, after that decree and permit, *i. e.,* on October 5th, 1925, Wisconsin amended her bill to its present form and the other states complainant joined as complainants and subscribed the amended bill. In view of the long delay in the decision on the suit of the United States below, it is comprehensible why the State of Wisconsin might try to invoke the original jurisdiction of this court in a bill identical in purpose with that of the United States. But now, considering the decision by this court in the federal case and the comprehensive action by every department of the Federal Government, and considering also the grotesque inappropriateness of the amended prayer asking this court (in derogation of the constitutional function of Congress and the statutory function of the Secretary of War), to permit or refuse diversion, or to determine the amount of diversion, or the amount and manner of sewage disposal, that will not interfere with navigation, the prayer and pursuit of the amended bill are unique.

ARGUMENT.

The bill makes no case justiciable here because the relief prayed for is not within the jurisdiction of the court, because all indispensable parties are not before the court, and because the bill well avers neither juridical right nor any injury.

I.

The bill asks the court to regulate navigation—a constitutional function of Congress and not of this court.

This bill seeks not to restrain specific administrative acts of an officer of the United States averred to be in excess or derogation of his authority, or the act of a state or person averred to be in violation of specific law or valid regulation. On the contrary, it avers that acts done by the State of Illinois under decrees of this court and under authority of federal statutes, and of Congress acting through duly constituted and empowered administrative officers of the United States in the regulation of commerce and navigation, are not proper regulations thereof. It asks this court to make an administrative investigation among most complex and difficult facts to determine whether any, or what amount of, diversion of water, and what manner and amount of sewage disposal, *are* proper regulations of commerce and then, by a decree, to enforce that judicial regulation, thus made by the court in derogation of the functions of Congress and of administrative officers of the United States acting for Congress.

From the narration, *supra,* it will be obvious that the

determination and resolution of the underlying questions here involve grave political considerations affecting the relations among states, between states and the United States and between the United States and Great Britain —in a word that the functions invoked are political, legislative and administrative and *not* judicial in character.

The relief sought is beyond the power of this court. In *Wisconsin* v. *Duluth*, 96 U. S. 379, in a suit by Wisconsin on a complaint similar to this, to enjoin diversion of national navigable waters by an artificial canal being constructed under color of authority of the United States, this court said: "If that body (Congress) sees fit to provide a way in which the great commerce of the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel by the natural outlet * * * ? When Congress appropriates $10,000 to improve, protect and insure this canal, this court can have no powers to require it to be filled up or obstructed—." And in *U. S.* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53, in speaking of the power of Congress over navigation, this court said: "So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. *Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.*" (Italics ours.) And in *Southern Pacific Company* v. *Olympian Dredging Co.*, 260 U. S. 205, where, as here, the court was addressing an attack on the action of the Secretary of War in pursuance of the same congressional mandate we are considering here, this

court said, quoting with approval *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177: "It is for Congress, under the Constitution, to regulate the right of navigation, by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe the way in which the question of obstruction shall be determined. *Its action in the premises cannot be revised or ignored by courts or by juries,* except that when *it* provides for an investigation of the facts * * * the courts can see to it that *executive officers conform their action to the mode prescribed by Congress.*" (Italics ours.)

To the same effect, that the power of regulation is exclusive in Congress and is legislative and not judicial in character, see *Second Wheeling Bridge case,* 18 How. 421; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *United States,* 179 U. S. 141; *Louisiana* v. *Texas,* 176 U. S. 1; *Chicago B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561; *West Chicago Street Ry.* v. *Illinois,* 201 U. S. 506; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194.

If the conclusion were not thus amply supported by judicial pronouncement, it would stand on its own logic. As will be shown elsewhere herein, the subject is one that admits only of single and unified control; it is political in character and regards a nice balance of interests, rights, benefits and injuries between all the states of the Union and the relations of the United States with Great Britain; it can be properly concluded only upon a most abstruse technical and scientific determination of fact and can be administered only by a process of continuous regulation and supervision.

Such relief, as is here sought, would destroy unity of control because it would bifurcate control between this Court and Congress. Such political action is not within

the province of this court. Such administration is beyond its facilities and is inconsistent with, and repugnant to, the judicial function. All this the Constitution astutely recognized when it placed the regulation of commerce and navigation within the exclusive province of Congress, and it is to Congress, and not to this court, that the states complainant should apply for modification, in their behalf, of the present great integral plan of the national government for the regulation of interstate and international navigation.

II.

The United States and other states are indispensable parties.

All persons materially interested in the subject matter of a suit in equity must be made parties to it. This rule applies to cases in the original jurisdiction of this court. *State of California* v. *Southern Pacific Co.*, 157 U. S. 229; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

The subject matter of this suit is the navigable capacity of navigable waters of the United States. Any finding of an interest of the states complainant in these waters, sufficient to maintain this action, would *ipso facto* establish the same interest of all states and *a fortiori* of the absent states littoral of the Great Lakes and of the states below Illinois bordering the Mississippi River. When the latter states were here as *amici curiae* in the case of the *Sanitary District* v. *U. S.*, 266 U. S. 405, this court decided against their inherent right in any *increase* in the diversion beyond that *authorized by law*, but there can be no doubt of their right to whatever diversion may be *authorized by law*, or of their right

to be heard in a proceeding, such as this, which seeks a judicial investigation and determination of the question as to what amount of diversion has been, or may be, *authorized by law.*

As to the material and adverse interest of the United States, this is the identical subject matter which was involved in the suit instituted by the United States against the Sanitary District of Chicago. *Sanitary District* v. *United States,* 266 U. S. 405. In that case, this court held that the United States had, not only an interest, but the *paramount* and *controlling interest*—an interest *"imminent and direct"*—in that subject matter, and that the Sanitary and Ship Canal "has been * * * an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf * * * which the United States, we have no doubt, would be most unwilling to see closed."

The amended bill asks that the taking of *"any water whatever* from Lake Michigan" be enjoined, that the amount of diversion "reasonably required for the purpose of navigation" be determined and that the determination of the Secretary of War, acting for Congress, of the amount of diversion proper in the regulation of navigation, be declared invalid and that the determination of this court be substituted therefor by a decree. Such a decree would injuriously affect the right of the United States, not only in its *exclusive* power to regulate interstate commerce in the Great Lakes, in the Sanitary and Ship Canal, and the Desplaines, Illinois and Mississippi Rivers, but also in all that has been done in creating the great national and international waterway of which the works here involved are a pivotal part. It would thus adversely affect the rights and interests of the United States in matters where, as this court said

in the Sanitary District case, *supra*, "*the national importance is imminent and direct* * * *." The United States is thus a necessary and an indispensable party.

Whenever it appears "that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit," the court will dismiss the cause, even where the point is "not raised by the pleadings or suggested by * * * counsel." (*Minnesota* v. *Northern Securities Co.*, 184 U. S. 189), and this, even though such other parties "cannot be joined without ousting jurisdiction." (*State of California* v. *Southern Pacific*, 157 U. S. 229.)

It is clear, therefore, that the amended bill is defective and should be dismissed, for want of essential parties, whose rights would be vitally and adversely affected if the relief sought were granted.

III.

The bill well avers no injury.

The burden of the bill is that the level of the lakes is lowered six inches. This is not, and is not asserted to be, the injury complained of, but the bill proceeds to name lake harbors within the states complainant and to describe some of the vessels plying those lakes as having "enormous carrying capacity." It explains that, with every inch of normal draft which a vessel is unable to use, freight costs proportionately increase above their lowest possible minimum. All this is no more than an obvious essay on the mechanics of buoyancy and the economics of freighting. It avers no injury. On the contrary it is meticulously careful not to specify, in any case, harbor depth, or vessel draft, or one single instance of an actual or threatened reduction in the carrying capac-

ity of any vessel at any named port—in other words, one single instance of actual or threatened injury. Yet so cunning and so adept is the craftsmanship of the bill that, while saying nothing of the kind, it seems to say that *existing vessels* have actually had their capacity impaired *at the harbors named* by the diversion complained of, and that there has been loss to their people in freight rates due to reduced loading of existing vessels. What the finely fitted phrases actually say is that six inches deducted from a harbor's depth deducts six inches from the draft of the *largest vessel that could possibly enter it,* regardless of whether that vessel be built, building, or only imagined.

If this were the only consideration, what a field of dreams is here released! We do not know the depths of the named harbors, but to the extent that they *are* deep, vessels of "enormous carrying capacity" could be *imagined* more enormous still, until, for aught we know, freight rates would become infinitesimal. The true theory of the bill reduces to an absolute right in such musings and an actionable injury occasioned by six inches reduction in the field of fancy's flight. Remote is this and most illogical. For there *are* other considerations. In the first place, no argosy, sailing outside fiction, ever took or denied a harbor on the margin of a six-inch clearance. That aside, were harbors never so deep as those named, either before or after the claimed diversion, it by no means follows (as it must follow if this action is to lie on its own averments) that ships are or could or would be built to their measure. *Many* considerations control the draft of ships, for example, the minimum depths of their prospective route at whatever place that may be. There is nothing either in the bill or in the field of reason to argue that place, in this case, to be these

harbors or any of them, and only the harbors are named as the locii of the injury. Ship design is also controlled by the character of waters, ship-canals, and of *all* ports, rapids and bars which they must ply—the purpose for which they were designed as to speed, cargoes and length of run—it were useless to go on with this. If lake ships ever reduced their cargoes to accommodate six inches lost at any of these harbors by act of the State of Illinois—if there were a single reasonable threat of such a result—it would have been a simple matter to ascertain the facts and state them with precision. Such an averment is not made even in general. We find here only words and phrases neatly arrayed to make them seem to say the thing they say not. The thing they do say is not even a *threatened injury*. It is a dissertation on irrelevant possibilities and fanciful at that. No injury at all is averred.

The State of Wisconsin (but none of the other states complainant) labors and attempts to produce an injury thus; if harbor depths are lessened, the largest ships that could enter them would take smaller cargoes, thus increasing lake freights and hence the cost of coal for public buildings. This is fanciful and remote. There is no showing that any freight rate ever had been so increased, or that lake rates control freight rates in Wisconsin. Even if such a showing were possible the injury would obviously be infinitesimal.

The injury of its citizens (if there were any such injury) is not the injury of the state and it cannot be made so for the purpose of conferring jurisdiction on this court. The state cannot make its citizens' case its own *"and compel the offending state and its authorities to appear as defendants in an action brought in this court."* *Louisiana* v. *Texas*, 176 U. S. 1; *New Hampshire* v.

Louisiana, 108 U. S. 76; *Oklahoma* v. *A. T. & S. F. Ry.,* 220 U. S. 277; *Oklahoma ex rel West* v. *Gulf C. & S. F. Ry.,* 220 U. S. 290.

Even if there were just such a result as the one the bill seems to relate, it is such an incident of national progress as is not actionable. In *Miller* v. *Mayor of New York,* 109 U. S. 394, the court said, speaking of a similar result: "* * * However much it may * * * affect the business of private persons * * * it cannot on that ground be the subject of complaint before the courts. Every public improvement whilst adding to the convenience of the people at large affects, more or less injuriously the interests of some."

For the purpose of "making weight," the bill asserts that, before the stupendous national project of linking the Great Lakes-St. Lawrence basin with the Mississippi system was consummated by the canal here complained of, there *was* a navigable waterway from Lake Michigan to the Mississippi, which this great engineering work has displaced. The court will take judicial notice of the map and of Holy Writ. Jacob was not "*injured*" in the exchange of birthrights and red pottage. Only complainants sore pressed for facts would conjure up an "injury" such as this and we notice it only to say that, if the exchange of a waterway 25 feet deep and 160 feet wide (*Sanitary District* v. *United States, supra*) for two reedy creeks and a portage across a continental divide be an injury to navigation, the federal government and not these states is the party to complain of it. If there *were* an injury it would not be to the states complainant but only to a few of their citizens and we have already shown that a state cannot make its citizens' case its own, in such matters as this.

Similar in weight, cogency and inappropriateness, is the averment of "injury" occasioned to these complain-

ants through the use by Illinois of waters wholly within the state for sanitary purposes therein. The "injury" is an alleged pestilential condition in Illinois. The court will again take judicial notice of the map. There it will see populous, prosperous and rapidly growing communities, pleasure parks, and new and extensive residential districts starred all along this water course. It will see rail and state highways, the latter recently built, snugly paralleling the "pestilential" way. It will take judicial notice of its own proceedings. There it will observe (*Sanitary District* v. *United States, supra*) four states and six of the more progressive commercial associations in the United States, filing here in the name of Interstate Commerce, a brief seeking, no longer ago than last October, to perpetuate the precise conditions complained of. In *Missouri* v. *Illinois,* 200 U. S. 496, it will find itself deciding that the acts complained of create no such injury to commerce as is here averred. In the bill itself, and in the narrative above, it will learn that control of the acts complained of and their effect on commerce and navigation is and for many years has been under the supervision and control of the United States, a circumstance which should throw much light on the degree of substance in the assertions and which as shown elsewhere herein is, for other reasons, sufficient to abate even the hypothesis of injury to these states.

But, the foregoing sufficient considerations quite apart, to aver well a juridical injury in this alleged public nuisance these states complainant must show some *direct and special* injury. (*Northern Pac. R. Co.* v. *Whalen,* 149 U. S. 157; *Mississippi, etc., R. Co.* v. *Ward,* 2 Black 485; *Georgetown* v. *Alexandria Coal Co.,* 12 Pet. 91.)

The waters, alleged to be polluted, lie wholly without and below all of the complainant states. The alleged

injury is the impairment, by pollution, of the navigability of certain navigable waters of the United States, lying wholly within the State of Illinois. It is not averred that any of the complainant states themselves navigate these waters. The injury averred is to the *citizens* of these states, and then only when they leave the states complainant and navigate waters wholly within Illinois. But the right of the citizens of the states complainant to navigate these foreign waters is a right common to the citizens of all the states and, as we have already shown, the state cannot make its citizens' case its own.

There is a further averment that the availability of certain portions of the Chicago River as an inner harbor has, by swift current and obstruction, been impaired and that freight once *there* accommodated can be *there* accommodated no longer, but since there is no averment that it is not elsewhere and better accommodated in the Chicago harbor (as it is) or that any state or person is in the slightest degree inconvenienced by the change (as none is), the averment recites no injury, and, indeed, there is none. And, if there were, it would be an injury to a few navigators, citizens of the states complainant, and not to the states.

Thus, both upon established legal principle and upon an analysis of the language of the complaint, it will be found that the element of injury, which is absolutely essential to the maintenance of this action, is altogether missing from the averments of the amended bill.

IV.

There was never a property right in the states complainant in the navigable capacity of these waters.

This action is based on a pretended *"common law right"* of the states complainant in the *"natural navigable capacity"* of Lake Michigan, and a pretended

"common law right" of the people of those states in the navigation of four of the Great Lakes and the navigable waters between and from those lakes into the Mississippi River and the Atlantic Ocean. The bill avers that it is brought on behalf of those states *"in their proprietary capacities"* and *"on behalf of the people of said several states for the purpose of establishing and protecting the legal rights of said states and their people."*

A juridical right is essential to the predication of a juridical injury and to sue in the original jurisdiction of this court, a state must show just such an element of right as an individual must show in order to maintain a suit in any proper jurisdiction. *South Carolina* v. *Georgia*, 93 U. S. 4; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Louisiana* v. *Texas*, 176 U. S. 1; *Cal.* v. *So. Pac.*, 157 U. S. 261; *Oklahoma* v. *A. T. & S. F. Ry.*, 220 U. S. 277; *Oklahoma Ex rel West* v. *Gulf C. & S. F. Ry.*, 220 U. S. 290. No such right is here averred. The pretended "common law right," of the states complainant, or of their people as citizens of those states, in the "natural navigable capacity" of the Great Lakes and other navigable waters of the United States as well as the characterization of the appearance here of those states as being in "their proprietary capacities," are all misconceptions of established law.

The rights of states in the commerce and navigability of their waters are *not proprietary rights* such as are certain aspects of ownership of lands under those waters or their riparian rights of user of waters along their shores; rather they are attributes of sovereignty such as the rights to coin money or keep troops and ships of war—*sovereign rights* held in trust by states for the peculiar and preferred benefit of their *own* peoples. (*Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1; *Long Sault Development Co.* v. *Kennedy*, 212 N. Y., 1; *Martin* v. *Wad-*

dell, 16 Pet. 367; *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387; *Shively* v. *Bowlby*, 152 U. S. 1; *The Daniel Ball*, 10 Wall. 557; *Hardin* v. *Jordan*, 140 U. S. 371.)

Whatever may be the role in which these states complainant appear, it is *not* in their "proprietary capacity" and the bill errs in so averring. Neither these states nor their people have any property rights in the navigable capacity of these inland seas. Nor does Wisconsin take anything by her labored and fanciful property right to lower freight rates on coal for public buildings. It is remote, insignificant (we believe non-existent) and it is not well averred. The other states complainant do not aver it at all. Even if it should exist in theory it is infinitesimal and too remote to be entertained here; (*New York* v. *New Jersey*, 256 U. S. 296; *Kansas* v. *Colorado*, 206 U. S. 117; 2 *Story Com. on Equity* 203, 204.)

They must demonstrate *some* right to predicate their injury or their action floats, like Mahomet's coffin, supported by naught. The right they *claim* is navigation. That they have misnamed it is important in this, that since it is the sole right on which they rest and is *not* proprietary, they are here in no *proprietary* capacity whatever. The right they claim, if right it be, is sovereign or it is nothing. But there is no such sovereign right. (See Point V. *infra.*)

V.

Sovereign rights of the states complainant in the navigable capacity of these navigable waters have been completely appropriated by the United States to the exclusion of the States.

1. By the Constitution.

That, at common law such attributes of sovereignty, as would support this suit—such rights in such waters—

subsisted in states, no one will deny, and, doubtless, the repeated reaching of the bill toward "common law rights" refers to this. But it is doctrine almost too familiar to require cited support that, upon their federation or admission, the states of *this* Union surrendered to the general government precisely that attribute of sovereignty relating to navigation upon which alone this bill is based. *Gibbons* v. *Ogden,* 9 Wheat. 1 pp. 187, 189, 198, 200, 201, 209; *Gilman* v. *Philadelphia,* 3 Wall. 713-724; *South Carolina* v. *Georgia,* 93 U. S. 4. The *Common law* and sovereign right of the several states became the *Constitutional* and sovereign right of the United States. That benefit held in trust for its people by each state broadened to all the navigable waters, and was conferred on all the people of the United States. Thereby the trustee and sole vindicator of these rights became the general government and ceased to be the states. There is thus no such right as that averred remaining, at common law or otherwise, in either these states complainant or their people as citizens of these states—no right—no injury—no cause of action justiciable in this court.

In the first Wheeling Bridge case, *supra,* the question of the right of the State of Pennsylvania to appear here to seek from this court regulation of navigation as against another state was not discussed. But in *Louisiana* v. *Texas,* 176 U. S. 1, this court in deciding that it had no jurisdiction to consider a cause such as the instant case said: "In *Pennsylvania* v. *Wheeling Bridge,* 13 How. 518, the court treated the suit as brought to *protect the property* of the State of Pennsylvania." In the first case the claimed obstruction was a low horizontal barrier thrown directly athwart an avenue of commerce. This court held that the nuisance complained of could "be ascertained by measurement * * * it is a nuisance * * * it

is shown by mathematical demonstration." In such simple circumstance it may well be that there was involved no such "regulation of commerce" as would invoke the consideration so obvious here. But in this case the questions to be determined involve the fluctuation of waters from the Lower Mississippi to the Gulf of St. Lawrence, the relative rights of all the states, the relations of the government with foreign nations, and a constant and continuous regulation and administration—action that could not possibly be undertaken by this court without interfering with the express powers of Congress.

It is believed that all cases where a state has successfully invoked the original jurisdiction of this court to secure decrees affecting the regulation of commerce were based on some such unimpeachable right of state sovereignty as the protection of its property or the health and comfort of its people (*Missouri* v. *Illinois,* 180 U. S. 208; *New York* v. *New Jersey,* 256 U. S. 296; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Kansas* v. *Colorado,* 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230.)

But where, as here, a state bases its injury on its alleged sovereign right to have a *status quo* preserved in navigable capacity of navigable waters of the United States, the court must answer in accord with its answer in the case of *Louisiana* v. *Texas,* 176 U. S. 1, dismissing a somewhat similar bill on demurrer; "* * * *the vindication of the freedom of interstate commerce is not committed to the State of Louisiana*" See also *Oklahoma* v. *A. T. & S. F. Ry.,* 220 U. S. 277; *Oklahoma Ex rel West* v. *G. C. & S. F. Ry., et al.,* 220 U. S. 209. In the case of *New York* v. *New Jersey,* 256 U. S. 296, the property and the health and comfort of the citizens of the complainant were directly involved and the United States

intervened asserting its paramount right in navigation. In the first Wheeling Bridge case, as we have shown above, this court construed the case to rest on property rights of Pennsylvania and not on the right claimed here, *i. e.*, sovereign rights in the navigable capacity of national navigable waters. On whatever theory it rested, its outcome was not a very happy one for the contention for regulation of navigation by this court. In the interval between the first *Wheeling Bridge* case, 13 How. 518, and the second *Wheeling Bridge case*, 18 How. 421, Congress found to be *not* an obstruction the same bridge which this court had previously found to *be* an obstruction. This circumstance seems to argue strongly against the expediency of two tribunals regulating that which, by its nature requires singleness of control.

A projection of the contrary contention discloses it as subversive of the very purpose of the Constitution. The rights of all states in navigable capacity of national and international waters, are equal and the rights of the nation are paramount. If this action lies, so do 49 similar actions lie—one by the United States and one by each of the 48 states. But to avoid such a result was the prime if not the controlling purpose of the adoption of the Constitution itself and beyond question it was the precise purpose of the Constitution in establishing the United States as the true and only conservator of the rights of these states, and of all states, and of the people of these states, and of all states, in matters such as this. Contrary doctrine is a counsel of confusion and should not prevail.

2. Such sovereign rights of the states complainant as are indispensable to support this suit have been completely and exclusively appropriated to the United States by general acts of Congress assuming exclusive control of navigable waters of the United States.

The Great Lakes are navigable waters of the United States (*The Propeller Genessee Chief*, 12 How. 443; *U. S.* v. *Rodgers*, 150 U. S. 249; *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387; *Escanaba and Lake Michigan Co.* v. *City of Chicago*, 107 U. S. 678; *Cummings* v. *Chicago*, 188 U. S. 410; *Economy Light & Power Co.* v. *U. S.*, 256 U. S. 113.) They are more—they are international waters (Moore International Law Digest Vol. 1, p. 675; Hyde International Law 1922, Vol. 1, pp. 320-321; *The Propeller Genessee Chief, supra*, pp. 453-454; *Moore* v. *American Transportation Co.*, 24 How. 1, pp. 37-38; *U. S.* v. *Rodgers*, 150 U. S. 249, p. 258; *Boundary Water Treaty of January* 11, 1909, 36 St. at L. 2448; *U. S.* v. *Chandler Dunbar Water Co.*, 229 U. S. 53, at p. 67.) Subjects of commerce which require a general system or uniformity of regulation are national in character and as to such subjects the right of the United States is exclusive of the right of states. (*Minnesota Rate Cases*, 230 U. S. 352; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204; (*summarizing cases on this principle*) *Wilmington Transportation Co.* v. *R. R. Commission of California*, 236 U. S. 151; *Sanitary District* v. *United States*, 266 U. S. 405.) Navigation of the Great Lakes being international in character (*cases supra*) requires uniformity of control and therefore exclusive right in the nation. *Lord* v. *Goodall S. S. Co.*, 102 U. S. 541, p. 544; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, p. 273.

Prior to the enactment by Congress of the acts of September 19, 1890 (26 Stat. at L. 454) and March 3, 1899,

(30 Stat. at L. 1151) it had been held by this court that there remained in states a vestigial right in the navigable capacity of the interstate navigable waters of the United States in matters purely local in character and incidental to and aiding commerce. (*Cooley* v. *Board of Wardens*, 12 How. 299; *Mobile County* v. *Kimball*, 102 U. S. 691; *Morgan's Co.* v. *Louisiana Board of Health*, 118 U. S. 455; *Parkersburg, etc., Trasnportation Co.* v. *Parkersburg*, 107 U. S. 691.) But by the enactment of these statutes, as this court has consistently and repeatedly held, *the United States assumed complete and exclusive right in respect of the navigable capacity of interstate waters.* "By the act of September, 1890, Congress inaugurated a new policy of general, direct control over the navigable waters of the United States." *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U. S. 205; *U. S.* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Lake Shore and Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S. 365; *Cummings* v. *Chicago*, 188 U. S. 410; *Union Bridge Co.* v. *U. S.*, 204 U. S. 364; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *U. S.* v. *Chandler Dunbar Water Co.*, 229 U. S. 53. It is to be noted that the first *Wheeling Bridge* case, *supra*, was decided before this legislation.

Guided by the report of the Joint International Waterways Commission, January 4, 1907, the United States negotiated a treaty with Great Britain, proclaimed May 13, 1910 (36 Stat. at L. 2448). The report of the Commission had concluded, *inter alia*: that to avoid polluting Lake Michigan, Chicago must dispose of the sewage, otherwise than in the lake; that to reverse the rivers into which Chicago drains sewage during violent storms, 10,000 c. s. f. must be diverted through the Chicago River; that while not authorized by Congress "there seems to be a tacit general agreement that no objection will be

made to the diversion of 10,000 c. s. f.;" that such diversion of 10,000 c. s. f. will render practicable a waterway to the Mississippi River 14 feet deep; that the diversion at Chicago has lowered and will lower the lake levels. The treaty provided (Article 2) that diversions *already existing* should not give rise to the international remedies provided for subsequent diversions and (Article 3); that, in addition to diversion already permitted, other *obstructions* or diversions *affecting the natural level of boundary waters on the other side* should be permitted *only with the approval of an International Joint Commission;* and (Article 4) that neither government will permit obstructions in *"waters flowing from boundary waters,"* the effect of which will be to *raise* the natural level of waters on the other side of the boundary, except with approval of the International Joint Commission; and (Article 4) that boundary waters *shall not be polluted* on either side to injury of health and property on the other. By concurrence of the executive and Senate of the United States, we have here an undertaking by the Government to a foreign government utterly inconsistent with any theory of residual right *in a state* to maintain such a bill as this and equally inconsistent with the relief sought by this bill. That treaty preserved the existing diversion by Illinois. That diversion could not now be abated by the decree sought without affecting the level of the lakes existing at the time of the treaty, or without polluting the waters of Lake Michigan, or without making a radical and violent change both in the state of facts and in the understanding of national plan and policy upon which the treaty was negotiated.

Thus, whatever may have been the right of a state to seek regulation of navigation at the hands of this court. prior to the affirmative assumption by Congress of its

complete right of exclusive control of that subject by the general acts and the treaty cited above, it is abundantly apparent now that, with the integration and definition of the subject under the increasing complexities of modern economic and political relations, Congress has now, by general legislation and political engagements such as are cited above, appropriated such sovereignty and control of the subject, and given its administration such a political color, as to remove it entirely from the sovereignty of states and the adjudication of such questions as are here presented from the jurisdiction of this court.

3. The right of the states complainant to maintain this suit has been entirely obliterated by particular legislative, executive and judicial acts of the United States assuming complete control of the very acts complained of and of every matter or thing affected by them.

At the very beginning of its existence, the Federal Government recognized the route of the Sanitary and Ship Canal as of the utmost importance in any general plan of inland navigation of the United States (Treaties of 1795 and 1816) and contemplated Illinois as the locus and instrumentality of the work (Acts of 1818, 1822 and 1827). By the latter two acts is authorized *a* canal uniting the waters of the Illinois River with those of Lake Michigan, and, since the former is lower in altitude, the Act of 1827, by necessary implication, authorized the permanent diversion of water from Lake Michigan into the Missouri-Mississippi system. The amount of diversion was not specified but, since the Act was providing for a most important navigation and wisely allowed for the expansion of the canal to meet the expanding necessities of commerce and increasing magnitude of ships and other

facilities of navigation, it cannot be doubted that this "affirmative authorization by Congress" was for the permanent diversion of a large amount of water. It is most difficult to suppose that such organic and fundamental authorization contemplated only the rudimentary canal first built or only the small amount of water necessary to float the slight craft then used in inland navigation. The Act employed no such limiting terms. Determination of the precise amount of water appropriate to a proper regulation of the changing requirements of navigation is inherently a legislative and administrative question which can find no place in this controversy. It is sufficient that Congress authorized the canal and diversion of water through it for the purpose of connecting Lake Michigan with the Illinois River, and that it did so in the exercise of its power to regulate commerce among the states and that it later entrusted to the Secretary of War the function of permitting or denying any increased diversion. "It is for Congress * * * to regulate the right of navigation by all appropriate means * * *. Its action in the premises cannot be revised or ignored by courts or by juries * * * ". *Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 177; *Wisconsin* v. *Duluth*, 96 U. S. 379; *Southern Pacific* v. *Olympian Dredging Co.*, 260 U. S. 205; *Gilman* v. *Philadelphia*, 3 Wall 713; *U. S.* v. *Chandler Dunbar Co.*, 229 U. S. 53. These acts alone are sufficient to dispose of the complainants' claim to an absolute right in the natural navigable capacity of these waters and their prayer to abate the canal by forbidding the diversion of "any water whatever" through it or to have this court attempt to proportion diversion or to regulate navigation and sewage disposal to whatever measure the court may determine is appropriate to the requirements of commerce.

If it be said that the Ship and Sanitary Canal is not identical with the Illinois-Michigan canal, the history

of both shows clearly that the former is a logical and orderly evolution of the latter; that what was contemplated by Congress was *a* canal to accommodate the growing requirements of navigation; that Congress never did specify a particular canal; that by successive developments, the rudimentary original canal became the present great waterway, and that every step and the effect of every step of those developments were alertly observed by the United States Corps of Engineers and promptly reported to Congress, which, to this day, has not complained of, or dissented from, any act of the State of Illinois in respect thereof. There can be no question of affirmative authorization by Congress of the project of the waterway and of the permanent diversion of water from Lake Michigan through it. The only conceivable question relates to the subsequent federal authorizations of increased *amounts of diversion* and whether they were consistent with proper regulation of commerce. While the latter question is not properly considered here, it is important to observe that the government, acting through all of its three great branches, has consistently authorized and controlled such diversion to such an extent that, *even had there been no statutes of* 1818, 1822 *and* 1827, *the states complainant would have no action here.*

The Act of 1899, about which so much has been said in this case, announced the general rule by which Congress elected to exercise its regulation of the navigable capacity of the navigable waters of the United States. Much has been said of its proper interpretation and that subject will be discussed in Point VI *infra*. Suffice it here to say that, under the alert and constant supervision of the officers of the United States, every act of the State of Illinois in the construction of the works of the canal and the diversion of waters through it, was observed by Congress and specifically authorized and approved

by the Secretary of War, in precise accord with the method prescribed by Congress, in that statute, for the authorization and legitimization of works and acts affecting the navigable capacity of the waters of the United States. The decisions of this court are uniform that acts so authorized are acts done in the proper legislative and administrative regulation of interstate commerce and, as such, are beyond impeachment in this court, in any attempts to vindicate the claimed right of any state or person. (As to acts done under authorization of the Secretary of War as provided by the Acts of 1890 and 1899, see *Sanitary District* v. *United States,* 266 U. S. 405; *Southern Pacific* v. *Olympian Dredging Co.,* 260 U. S. 205; *Monongahela Bridge Co.* v. *U. S.,* 216 U. S. 177; *Louisville Bridge Co.* v. *United States,* 242 U. S. 407; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690; *Cummings* v. *Chicago,* 188 U. S. 410; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113. As to acts done in respect of navigation under color of other authority of the United States, *Wisconsin* v. *Duluth,* 96 U. S. 379; *South Carolina* v. *Georgia,* 93 U. S. 4; *Second Wheeling Bridge case,* 18 How. 421.)

In addition to acts by Congress and by administrative officers under the authority of Congress in respect of the canal and diversion through it, Congress has acted affirmatively in respect of each and every of the waters claimed to be affected by the canal and the diversion. (See Appendix I.) An examination of these acts will disclose that the same power (Congress and administrative officers acting thereunder), which projected and authorized the diversion of waters *away* from Lake Michigan and the ports of the Great Lakes were and constantly are, as alert to *improve and foster* those ports and waters. As a part of an integral plan to regulate and improve navigation for the nation, the Federal Government has assumed responsibility for those harbors and has so altered,

modified and improved their "*natural navigable capacity*" as to make them practicable for shipping on the Great Lakes. This it did as part of the same great scheme of inland navigation which included diversion of waters through the canal. It is a curious contention that these states complainant have a right to have restored the "*natural* navigable capacity" of these waters by a frustration of one part of this integral plan, when it is obvious that they would assail high heaven with their protests if it were even suggested that the "*natural* navigable capacity" of these waters should be restored by a withdrawal of the benefits flowing from the same fostering hand through another part of the same plan.

Congress has covered the whole field, if not by the general acts discussed in Point V-2 *supra,* then surely by the particular acts discussed herein. These states complainant cannot have their cake and eat it. In this regard, as in all others, there appears the incongruity of the claim made with every principal theory of the government ordained by the Constitution.

But the particular acts of the United States in regulating and assuming control of all the modification in navigable capacity here complained of, are not confined to the legislative and executive branches of the Federal Government. It has acted upon them also through its judiciary. In *Missouri* v. *Illinois,* 180 U. S. 208, this court, at the suit of Missouri (based on a perfectly defensible sovereign right in the state and *not* the right here asserted) examined the state of affairs claimed in the instant bill to be an impairment of navigable capacity by pollution and decided against the contention. And in the case of *Sanitary District* v. *United States,* 266 U. S. 405, this court at the suit of the United States addressed itself to every object, right, matter or thing con-

cerned in the present suit and sustained the authorization of Congress by the Secretary of War of the diversion here complained of and enforced that authorization by a decree. Thereafter the Secretary of War issued another permit, by the express terms of which every act of diversion by the defendant Sanitary District, is now, and in the future will be, done under the *supervision of the United States District Engineer at Chicago and at certain times under his direct control.* (See p. 31 amended bill of complaint.) The acts complained of are the acts of the United States.

There remains in the states complainant no scintilla of right on which to base this bill. The right they assert was aforetime sovereign in states. *That* attribute of sovereignty they surrendered to the United States. If any remnant for a time remained by consent or complaisance of the nation, the last vestigal shadow of it in respect of the subject here addressed has been absorbed by the vigorous action of the United States by every agency of its organization. By its legislature it has promulgated laws governing the very acts complained of and every object affected by them. By its judiciary, at the instance of its executive, it has examined and effectually controlled the very acts complained of. By concurrence of its executive and its Senate, it has undertaken obligations to foreign nations in respect of those acts and has submitted them to scrutiny (and even a measure of control) by a Joint International Commission. And finally, by its executive, under the authority of its legislature, it has undertaken actively and masterfully to regulate and direct those acts in general and particular, and, at this moment, has them under its own supervision.

VI.

Every act complained of was done by or under valid and proper authority of the United States.

In view of the comprehensive nature of the federal acts hitherto discussed governing every aspect of this case, it seems an act of supererogation to examine in further detail the nature of any particular act but, since there is an averment of the bill that the permits of the Secretary of War were invalid, under the Act of 1899 *supra*, for the purpose of authorizing the diversion complained of, it may be well to consider that question.

It should not be necessary to go beyond the decision in *Sanitary District* v. *United States*, 266 U. S. 405. There, with the full gravity of the case before it and with something of the same contention, this court, in addressing itself squarely to an interpretation of the act in question and affirming the validity of the authority and action of the Secretary of War, said: "This withdrawal is prohibited by Congress, *except so far as it may be authorized by the Secretary of War.*" It decreed an injunction of any diversion in excess of that permitted by the Secretary of War and limited its decree as "*without prejudice to any permit that may be issued by the Secretary of War according to law.*"

In *Louisville Bridge Co.* v. *United States*, 242 U. S. 407, the court said in construing the statute: "* * * The statute itself prescribed the general rule applicable to all navigable waters, and merely charged the Secretary of War with the duty of ascertaining in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule." (See *Maine Water Co.* v. *Knickerbocker*, 99

Maine 473, cited with approval in *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U. S. 205, and in *Garrison* v. *Greenleaf Johnson Lumber Co.*, 215 Federal 578.) In *Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 177, the court said: "Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject." (See also the opinion of the Attorney General of the United States of February 11, 1925, Appendix III.)

The contrary contention that the Act of 1899 requires *an Act of Congress* to satisfy the requirement of Section 10 that "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited * * *," would make the succeeding provisions of that section meaningless and would paralyze the facilities of navigation in the United States. Obviously Congress cannot affirmatively authorize every obstruction and modification in the navigable capacity of the navigable waters of the United States. By the first clause of that section, obstructions are prohibited unless affirmatively authorized by Congress. By the second clause, certain specified structures are named and it is forbidden to *commence* building them without authority of the Secretary of War. By the third clause, modifications in navigable capacity are addressed, several species are named and they and modifications in general are prohibited without authority by the Secretary of War. The intendment seems clear and the only interpretation consonant with reason is that the question of whether particular works constitute obstructions in the sense of the statute is referred by the law to the Secretary of War. If he determines that they do *not* constitute "obstructions" in such

sense, he may authorize them or not as the interests of navigation warrant. If he determines that they are obstructions in such sense only Congress can authorize them. If the Secretary of War determines that they are not obstructions and authorizes them, his act is the act of Congress under the statute. This is believed to be the meaning of the interpretation of the statute by this court in the *Louisville Bridge case, supra.* Neither in law nor logic does there seem to be any question of the authority of the Secretary to authorize this diversion.

But there is a faint suggestion in the bill that, regardless of what may be his statutory authority, the action of the Secretary is invalid as being a capricious or at least an inappropriate determination of the proper necessities of navigation. Every presumption is against this extravagant theory. In *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S. 205, where it was contended that an authorization of the Secretary of War to leave sawed-off pilings of an old bridge athwart an avenue of commerce, was so obviously a conclusion not in the interests of navigation that the court should interfere, this court said: "Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of navigation or upon the fact that, to leave the stumps in the bed of the river, would be of some positive service in stabilizing the shifting bed of the stream or useful in some other way, does not appear. *It was not for the petitioners, however, to question either his reasons or his conclusions.*" In *Martin* v. *Mott,* 12 Wheat., 19, this court said: "Whenever a statute gives a discretional power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute con-

stitutes him the sole and exclusive judge of the existence of those facts." See, also, *Mullan* v. *U. S.*, 140 U. S. 240.

Quite apart from this controlling principle, however, the history and circumstances of these works and their overwhelming importance to a great national project of inland navigation discloses that the suggestion of inappropriateness in the Secretary's action is entirely unwarranted. We find his action supported by the history of a century of development of a projected waterway from the Gulf of Mexico to the North Atlantic recommended by a profundity of technical reports, by agencies of the Federal Government and fostered by acts of Congress appropriating large amounts of money. Latterly, we find the plan taking the definite form of a projected 14 foot channel to and below St. Louis, and a diversion of 10,000 c. s. f. as necessary to maintain a practicable channel of that depth, not only in the link between Chicago and Lockport but equally for the free navigation of the Illinois, Desplaines and Mississippi Rivers north of St. Louis. We find a joint International Commission considering boundary waters between the United States and Canada, reporting favorably on a diversion far in excess of that complained of and for the purposes recited above. We find the Federal Government guided by that report negotiating a treaty with Canada which preserved the present diversion at Chicago and indeed undertook obligations toward the Dominion which are inconsistent with any theory of the right of a State to compel its abatement. With such information and history before him, there can be no doubt that the determination of the Secretary of War bore a just and reasonable relation to the regulation of navigation and was consonant with the purposes and the general plan of Congress for the regulation of commerce among the

states and with foreign nations. Indeed, any other determination by the Secretary would have been such an obvious frustration of that purpose as to have invoked the immediate and serious consideration of Congress with a view to the revocation thereof.

CONCLUSION.

The tremendous gravity of the political and economic bearings of this case have only been hinted in this brief. They are doubtless fresh in the minds of the court from its recent consideration of all the facts in the case of the *Sanitary District* v. *United States,* 266 U. S. 405. Outstanding in that case, as in this, was the conclusion that the underlying questions involved were intrinsically political, legislative and administrative and certainly not judicial.

Surely the fate of a century-old national project of comprehensive water communications uniting two-thirds of the area of the United States with the Atlantic Ocean, or of a great sanitary establishment affecting the health and lives of a community of over three millions of people, or of the salubrity of that port and region through which filters the bulk of the commerce of our great inland empire, or of a matter inextricably concerned with our foreign relations with our most important neighbor, are not to be cavalierly resolved in the summary procedure of an injunction suit, brought by petitioners of tenuous and doubtful rights, even though those petitioners come clothed in the dignity of states of the Union.

The states complainant are, after all, merely four out of forty-eight, parties to a Federal compact. Their rights are not absolute. They are correlative of the complementary rights of all other states. The trustee of all

rights in the navigable waters of the United States is the Federal Government which must administer them for the benefit and enjoyment of the whole nation. The arbiter of the nice balance between right and duty of the several states in matters such as this must necessarily be Congress, acting in its administrative and political capacity, and not this court in a judicial determination in a summary procedure, which must confine itself to the consideration of particular matters before it to the exclusion of all question of policy and expediency in adjusting the relations between sovereigns.

The bill is inappropriate to the subject matter of the suit, to the jurisdiction of the court, and to the nature of the questions involved and should now be dismissed without further proceedings.

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APPENDIX.

Appendix I.

Partial list of Acts of Congress and administrative acts of officers of the United States assuming control of the waters affected by this suit; also list of documents of which the court will take judicial notice, showing complete compliance by the Sanitary District with conditions of the permit of the Secretary of War of March 3, 1925.

The improvement and maintenance of navigation upon the Great Lakes system of waterways may be properly divided into two aspects:

(a) The improvement of the shallow and difficult waters connecting the lakes, in the absence of which they would not have been navigable at all:

(b) The dredging of harbors, building breakwaters and piers to accommodate such ships as could pass to and from the different lakes through their connecting waterways as they were from time to time improved. Upon this whole project, the United States has expended many millions of dollars.

I. CONNECTING WATERS.

Lake Superior and Michigan-Huron.

The low water depths in the original condition of the St. Mary's River, were from 5 to 17 feet: "Navigation past the Falls was entirely impracticable, except for down-bound canoes and log crafts." Previous projects for the improvement of navigation at the St. Mary's

River were provided by Acts of Congress of July 8, 1856 (11 Stat. L. 25), August 2, 1882 (22 Stat. L. 191), August 5, 1886 (24 Stat. L. 310). The existing project adopted in 1892, provides for 21 feet depth, low water. The navigable connection was provided by locks and canal and dredging various channels of the St. Mary's River below the Rapids. (Chief of Engineers Reports, 1924, p. 1457.)

Section 11 of the Rivers & Harbors Act of March 3, 1909, (35 Stat. L. 815, 820), provided for the freeing of the St. Mary's River of power plants to carry out fully the project of controlling the outflow of Lake Superior in order to prevent the surface elevation of Superior from being reduced as low or raised as high as would exist under natural conditions. This act and the project of the United States with reference to the St. Mary's River and the control of the outflow of Superior for the purposes mentioned, were considered by this court in

United States v. *Chandler-Dunbar Water Power Company,* 229 U. S. 51, 57 L. Ed. 1063.

By the improvement of the United States at St. Mary's River and the control of the outflow of Lake Superior, the relation of the surface elevation of Lake Superior to that of Michigan and Huron, has been entirely changed by the impounding at various times of water in Superior, and the releasing of such water at other times. By this means, the surface elevation of Lake Superior with reference to that of Michigan-Huron, has been at times higher and at other times lower than it would have been under normal conditions. This has affected the relation, likewise, of the surface elevation of Michigan-Huron to that of Lake Erie. Various improvements at and in the St. Mary's River are further shown by the Chief of Engineers Reports for the year 1924 (p. 1459).

Connection between Huron and Erie.

The St. Clair River.

In its original condition, the St. Clair River was obstructed by shoals at the foot of Lake Huron. The least depths varied from 16 to 18 feet. The present depths provided by existing projects are from 19 to 21 feet, as authorized by Congressional Acts of July 13, 1892 (27 Stat. L. 88), and by the Act of July 27, 1916. (U. S. Engineers Report 1924, p. 1466.)

Lake St. Clair.

The entrance to this lake was obstructed by bars, over which the least depth of water was from 2 to 6 feet. The original projects were authorized by Acts of Congress of March 2, 1867 (14 Stat. L. 418), and by the Act of March 3, 1873 (17 Stat. L. 560), whereby depths were provided of approximately 16 feet by dredging channels through the lake. The present projects provide for deepening of the channels 20 to 21 feet, as authorized by Acts of Congress of August 5, 1886 (24 Stat. L. 310), July 13, 1892 (27 Stat. L. 88), June 13, 1902 (32 Stat. L. 331), March 2, 1919. (United States Engineers Reports 1924, p. 1469.)

Detroit River.

The low water depth in its original condition, was 12½ to 15 feet. Previous projects for the improvement of navigation in the Detroit River were authorized by the Acts of Congress of June 23, 1874 (18 Ph. 3 Stat. L. 237), July 5, 1884 (23 Stat. L. 133), August 5, 1886 (24 Stat. L. 310), August 11, 1888 (25 Stat. L. 400), July 13, 1892 (27 Stat. L. 88), March 3, 1899 (30 Stat. L. 1121), by which depths were provided of at least 20 feet.

The existing project provides for approximately 22 feet in depth, according to Acts of Congress of June 13, 1902 (32 Stat. L. 331), March 3, 1905 (33 Stat. L. 1117), June 25, 1910 (36 Stat. L. 630), March 4, 1913 (37 Stat. L. 801), March 2, 1907 (34 Stat. L. 1073), June 25, 1910 (36 Stat. L. 630), March 2, 1919. (Chief of Engineers Reports, 1924, p. 1473.)

Connection betwen Erie and Ontario.

The impossibility of passing from one lake to the other under natural conditions, and the necessity of providing such communication solely by canal, is so well known that it is unnecessary to call the court's attention to the various projects authorized by Congress for the construction of canals and for other improvements of navigation here.

II.

Harbor improvements by the United States.

All the harbors on the shores of these Great Lakes and their connecting channels, have been improved so as to provide depths from time to time as the navigable connections between the Great Lakes were improved, all pursuant to acts of Congress. Time and space will not permit our referring to all the different harbors showing the various improvements authorized by Congress. It will suffice to mention some of them, and the improvement of all of the various harbors on the shores of the Great Lakes are described in the various annual reports of the Chief of Engineers.

(a) *Marinette Harbor, Wisconsin.*

Thirteen feet depth was provided by Act of Congress of March 3, 1871 (16 Stat. L. 538), 15 feet by the Act of September 15, 1890 (26 Stat. L. 426), 18 feet by the Act of March 3, 1899 (30 Stat. L. 1121). Other improvements of the harbor were provided by Acts of July 13, 1892 (27 Stat. L. 88), June 13, 1896 (29 Stat. L. 202), June 13, 1902 (32 Stat. L. 331), March 4, 1913 (37 Stat. L. 801). (Chief of Engineers Reports, 1924, p. 1327.)

(b) *Green Bay.*

The original depth of this harbor was 10 feet. Congress has by its acts provided a depth of 18 feet. The Acts of Congress for the various improvements are June 23, 1866 (14 Stat. L. 70), June 23, 1874 (18 Ph. 3 Stat. L. 237), Sept. 19, 1890 (26 Stat. L. 426), June 3, 1896 (29 Stat. L. 202), June 13, 1902 (32 Stat. L. 331), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1330.)

(c) *Sturgeon Bay Harbor.*

Depths of 19 feet had been provided by Acts of Congress of July 13, 1892 (27 Stat. L. 88), July 13, 1892 (27 Stat. L. 88), June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1343.)

(d) *Algoma Harbor.*

From the original 3 feet depth, Congress by its acts has provided for 14 feet March 3, 1871 (16 Stat. L. 538), March 3, 1875 (18 Ph. 3 Stat. L. 456), July 5, 1884 (23 Stat. L. 133), March 3, 1899 (30 Stat. L. 1121), and March 2, 1907 (34 Stat. L. 1073). (Chief of Engineers Reports, 1924, p. 1347.)

(e) *Kewaunee Harbor.*

From an original depth of 13 feet, Congress has by its acts provided a depth of 18 feet. See Acts of Congress of March 3, 1881 (21 Stat. L. 468), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1350.)

(f) *Manitowoc Harbor.*

From an original depth of 4 feet, Congress has provided a depth of 18 feet by its Acts of August 30, 1852 (10 Stat. L. 56), March 3, 1881 (21 Stat. L. 468), September 19, 1890 (126 Stat. L. 426), June 3, 1896 (29 Stat. L. 202), and June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1357.)

(g) *Sheboygan Harbor.*

From an original depth of 4 feet, Congress has provided a depth of approximately 19 feet by its acts of June 23, 1866 (14 Stat. L. 70), March 3, 1873 (17 Stat. L. 560), March 3, 1881 (21 Stat. L. 468), August 18, 1894 (28 Stat. L. 338), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1360.)

(h) *Port Washington Harbor.*

From an original depth of but a few feet, Congress has provided a depth in this harbor of 16 feet by its Acts of July 11, 1870 (16 Stat. L. 223), August 14, 1876 (19 Stat. L. 132), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1364.)

(i) *Milwaukee Harbor.*

From an original depth of 4½ feet, Congress has provided 19 feet depth and has made various other improvements by its Acts of March 3, 1843 (5 Stat. L. 619), August 30, 1852 (10 Stat. L. 56), April 10, 1869 (16 Stat. L. 44), March 3, 1881 (21 Stat. L. 468), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331), March 2, 1907 (34 Stat. L. 1073), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1367.)

(j) *Racine Harbor.*

From an original depth of 2 to 3 feet, Congress has provided a depth of 19 feet by its Acts of June 23, 1866 (14 Stat. L. 70), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331), March 2, 1907 (34 Stat. L. 1058), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1372.)

(k) *Kenosha Harbor.*

From an original depth of 2 feet, Congress has provided approximately 19 feet by its Acts of August 30, 1852 (10 Stat. L. 56), June 23, 1866 (14 Stat. L. 70), September 19, 1890 (26 Stat. L. 426), March 3, 1899 (30 Stat. L. 1121), March 2, 1907 (34 Stat. L. 1073). (Chief of Engineers Reports, 1924, p. 1376.)

(l) *Superior Harbor or Bay.*

From an original depth of 8 to 9 feet, Congress has provided depths of approximately 20 feet by its Acts of March 3, 1873 (17 Stat. L. 560), and March 2, 1867 (14 Stat. L. 418), and June 3, 1896 (29 Stat. L. 202). Under the latter act the improvement of the Harbors of Du-

luth and Superior was bound as one project. All the conditions here were considered by this court, and it was held that the United States had and had assumed exclusive jurisdiction over Duluth and this harbor. (See *Wisconsin* v. *Duluth*, 96 U. S., p. 379.) (Chief of Engineers Reports, 1924, p. 1282.)

(m) *Ashland Harbor.*

Congress has provided for improvement of this harbor by its Acts of August 5, 1886 (24 Stat. L. 310). The original depth was 19 feet and 20 feet is provided by the United States. (Chief of Engineers Reports, 1924, p. 1292.)

The harbors above mentioned, constitute all the harbors along the Wisconsin shores mentioned in the amended bill. It would seem unnecessary to pursue the subject further as to other harbors of other states mentioned in said amended bill. As to the other harbors, Congress authorized improvements apace with the navigable facilities it provided generally upon the Great Lakes.

The United States has also consented to the construction by the Dominion of Canada of a dam across a channel of the Galops Rapids.

The outlet of Lake Ontario known as the "Gut Dam," which had the effect of permanently raising the surface elevation of Lake Ontario over its natural condition about 5 inches, as is shown by report entitled "Diversion of Water from the Great Lakes and Niagara River," made pursuant to Resolution Number 8, 65th Congress, the letter of the Chief of Engineers transmitting said report to the Speaker of the House of Representatives being dated December 7, 1920, to which is attached letter of the Chief of Engineers of November 9, 1920, and

report of the Board of Engineers August 24, 1920, and to which is also attached the report of Col. J. G. Warren of August 30, 1919. (See page 378 of said "Report on diversion of water from the Great Lakes and Niagara River." Also see H. R. 762, 63d Congress, Second session.)

The diversion through the Welland Canal in Canada, Black Rock Ship Canal, New York State Barge Canal at Niagara Falls for water power purposes, from Lake Erie, has the effect of lowering the surface elevation of the water of Lake Erie .35 foot, or 4.20 inches. (See said "Report on Diversion of Water of the Great Lakes and Niagara River," p. 23.)

III.

Table showing appropriations by Congress for the improvements, in the years 1923 and 1924, of certain harbors of the Complaining States, referred to in the amended bill, as follows:

TABLE OF FEDERAL HARBOR APPROPRIATIONS FOR 1923 AND 1924.

Name of Harbor.	1923	1924
Manitowoc	$120,000.00	$.....
Duluth-Superior	35,000.00	27,000.00
Port Wing	4,000.00	1,500.00
Ashland	10,000.00	5,000.00
Grand Marais	6,000.00	8,000.00
Agate Bay	2,000.00	2,000.00
Sandusky	230,000.00	100,000.00
Warroad	.....	4,000.00
Baudette	.....	1,500.00
Menominee	.....	5,000.00
Green Bay	.....	10,000.00
Sturgeon Bay	.....	15,000.00
Algoma	.....	3,000.00
Kewaunee	.....	6,000.00
Port Washington	.....	3,000.00
Milwaukee	.....	600,000.00
Kenosha	.....	3,000.00
Racine	.....	10,000.00
Toledo	.....	40,000.00
Huron	.....	12,500.00
Vermilion	.....	2,000.00
Loraine	.....	19,000.00
Cleveland	.....	45,000.00
Fairport	.....	65.000.00
Ashtabula	.....	7,000.00
Conneaut	.....	47,000.00
Erie	.....	20,000.00
Total	$407,000.00	$1,061,500.00
Grand Total		$1,468,500.00

Note: Similar appropriations by Congress for the improvement of all of the harbors of the complainant states, mentioned in the amended bill, have been made from year to year for more than a quarter of a century, but a tabulation of them here would be unnecessarily burdensome.

IV.

List of official acts and records and public documents showing that the conditions of the permit of the Secretary of War of March 3, 1925, have been complied with, as follows:

Under condition 2, the cost of inspections made by the Engineers Corps United States Army from March 3, 1925, to September 30, 1925, amounting to $614.28, was paid by defendant Sanitary District October 14, 1925; the cost of such inspection and supervisory work from October 1, 1925, to November 30, 1925, amounting to $224.24, was paid by defendant Sanitary District December 17, 1925.

Under condition 4, schedule of design and construction of sewage treatment plants for period from 1925 to 1929, was submitted by Sanitary Dustrict to and approved by the District Engineer at Chicago on July 28, 1925, and in pursuance of said program for sewage treatment works so approved, the following contracts were let by defendant Sanitary District for sewage treatment on the dates shown below. (See proceedings of the Board of Trustees of Sanitary District for the respective dates.)

August 6, 1925—95th Street Sewer Connection	$ 44,720.00
August 20, 1925—Operating Galleries, North Side Treatment Plant	316,090.00
Sept. 17, 1925—Preliminary Tanks and Grit Chambers, North Side Treatment Plant	801,665.80
Sept. 17, 1925—Dredging Calumet and Little Calumet Rivers	1,080,000.00
Oct. 1, 1925—Motors and Pumps, North Side Treatment Plant	35,475.00
Oct. 1, 1925—Miscellaneous Electrical Equipment, North Side Treatment Plant	22,900.00
Oct. 8, 1925—Contract No. 7, North Side Sewer	384,560.00
Oct. 8, 1925—Contract No. 8, North Side Sewer	354,200.00
October 15, 1925—Elevators, North Side Treatment Plant	13,734.00
Oct. 22, 1925—Air Conditioning Equipment, North Side Treatment Plant	29,900.00
Nov. 19, 1925—Pump and Blower House, North Side Treatment Plant	3,791,320.00
Total	$6,874,564.80

NOTE—Total expended for sewage treatment plants, pumping stations and the like (not including maintenance and operation to January 1, 1926)—$42,563,300—as shown by defendant Sanitary District's public records and documents.

Under condition 5, the million dollar bond provided to guarantee the payment of the cost of regulating or compensating works was approved by the Board of Trustees of defendant Sanitary District at its meeting of September 17, 1925 (see proceedings for said date), and was thereafter filed with and approved by and is in the possession of the War Department.

Under condition 7, the supervision of the work has been and is under the United States District Engineer at Chicago, as shown by the bill for cost of inspections from October 1st to November 30, 1925.

Under condition 8, on September 1, 1925, the City Council of the City of Chicago passed an ordinance (see proceedings of City Council for that date), adopting a program for metering at least 90 per cent of its water service, and for the execution of said program at the average rate of 10 per cent per annum.

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
537 South Dearborn Street
Chicago, Ill.

Address reply to
THE DISTRICT ENGINEER.
Refer to File No. M. A. 25.
(Chi. R. 140/688).

December 8, 1925. HLP.

The Sanitary District of Chicago,
910 S. Michigan Ave.
Chicago, Ill.

	Dr.
To United States Engineer Office, Chicago, Ill.	$2,224.24
Oct. 1 to Nov. 30, 1925.	

Incl.

To reimburse federal appropriations for the cost of supervising work done under permit signed by the Chief of Engineers, U. S. Army, and the Secretary of War on March 3, 1925, authorizing "The Sanitary District of Chicago to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8500 cubic feet per second, the instantaneous maximum not to exceed 11000 cubic feet per second."

Services:		
The District Engineer, Major Rufus W. Putnam, 2 days at $15.55	$ 31.10	
Asst. Engr. J. W. Woermann, 8 days at $10.555	84.44	
Asst. Engr. F. H. Doddridge, 1⅓ months at $250.00	333.33	
Junior Engr. A. T. Grohmann, 1 month	200.00	
Inspector Harry Lallo, 1 month	153.33	
Survey Party, 6 men, 1 month	774.99	
Crew, Motor Launch, "Whistler," 6 days at $9.466	56.80	
		$1,633.99
Plant Rental:		
Survey Boat, "Calumet," 25 days at $7.47	186.75	
Motor Launch, "Whistler," 6 days at $8.40	50.40	
		237.15
Subsistence, survey party, 25 days at $4.80		120.00
Travel and per diem allowances:		
Lallo	$ 99.76	
Doddridge	99.76	
Grohmann	33.58	
		233.10
Total		$2,224.24

Certified correct:

RUFUS W. PUTNAM,
Major, Corps of Engineers,
District Engineer.

Please draw check payable to order of "Rufus W. Putnam, Major, Corps of Engineers, U. S. A."—and mail same to "U. S. Engineer Office, Room 1201, #537 S. Dearborn St., Chicago, Ill."

Appendix II.

The following citations of public documents and records is intended merely as a suggestion of the interest of the Federal Government and the constant and intimate information supplied to Congress. For the convenience of the court, a *precis* of the subject matter entitled, "Appellant's narrative," pp. 451 to 529 will be found in the record of *Sanitary District* v. *United States*, 266 U. S. 405.

See also the following:

Permit for changes and improvement of works by Secretary of War, July 11, 1900.

Report of U. S. District Engineers at Chicago, June 20, 1900.

Report Chief of Engineers to Congress in compliance with Rivers and Harbors Act of 1896, H. D. 333, 54th Congress, 2nd Session.

Exhaustive report by a Board of U. S. Engineers, in compliance with Rivers and Harbors Act of 1899 contained in report of Chief of Engineers for the year 1900.

Reports of Chief of Engineers for the years 1901, 1902.

Report of Chief of Engineers to Secretary of War, December 12, 1905.

House Document 6, 56th Congress 1st Session and report of International Waterways Commission to the governments of the United States and Canada, 1907, Senate Document 959, 62nd Congress, 3rd Session.

Appendix III.

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

February 13, 1925.

My dear Mr. Secretary:

I acknowledge receipt of your letter of the 27th ultimo, in which you enclose a memorandum prepared for you by the Chief of Engineers of the War Department, with reference to your authority to grant the Sanitary District of Chicago a permit for a diversion from Lake Michigan of a greater quantity of water than 4,167 cubic feet per second. You ask my opinion as to whether you have authority to grant such a permit.

The applicable law is Section 10, of the River and Harbor Act of March 3, 1899 (30 Stat. 1151), which provides as follows:

> "Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or

of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

As your memorandum indicates, the language of this statute permits two constructions.

The first would authorize you, pending specific direction by Congress and always subject thereto, to determine the circumstances, under which the construction of works can be undertaken which may affect the navigability of interstate waters.

The other construction, which your memorandum also submits for my consideration, is that any obstruction to the navigable capacity of such waters is unlawful *per se*, and that the only purpose of the latter part of the quoted statute is to require the submission of every project, which might affect such navigability, to the Chief of Engineers and the Secretary of War, and that no construction shall be begun until the assent of the War Department has been secured in the manner provided by the statute.

In reply to your inquiry, I am of opinion that the different sentences of this statute must be read together, and construed in such a reasonable way as to attain the objective which Congress had in mind. It is obvious that Congress, which is not always in session, could not assume the duty of determining in each specific case whether or not a construction or use of navigable waters so impaired navigable capacity as to be forbidden by the paramount authority of the Federal Government. If this were not so, no construction which might affect the navigable capacity, could be undertaken when Congress is not in session; and it seems to me unreasonable to assume that Congress meant that, not only should all

public works be stopped when Congress was not in session, but that, even when it was in session, such construction or use of navigable waters should await the slow processes of Congressional action.

In my judgment, Congress intended, by the first section of the quoted statute, to assert its paramount authority over navigable waters,—and thus to serve notice that they could not be undertaken without Federal assent. I imagine that the section in question was due to the construction by the Supreme Court, of the prior statute of 1890, in the case of *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211. That Act provided that the "creation of any obstruction not affirmatively authorized *by law* to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited," and it was held, in the decision above referred to, that such an obstruction could be authorized by the law of a State, in the first instance.

Congress evidently intended that works should not be begun, which might affect the navigable capacity of the waters of the United States, solely on the authority of any State law. Congress, by the Act of 1899, therefore assumed full governmental power over the subject by a comprehensive and definitive prohibition of "any obstruction not affirmatively authorized by Congress."

For the reasons that I have already given, it does not seem to me reasonable to suppose that this contemplated that no work should be undertaken until Congress had first passed a specific statute to authorize it.. The interest of the United States in the waters of the country under the Commerce Clause of the Constitution is confined to their navigability, and any construction, which may be erected, or any use of the waters, may be said, in a remote, but not very practical, sense, to affect

these waters." The Constitution gave to the United States paramount authority over the general subject of navigability, in order that the Federal Government, and not the States, might determine under what circumstances the use of navigable waters for the purposes of the citizen or of the States so prejudicially affected the great consideration of navigability as to require a prohibition. Navigable waters may be used for many purposes other than those of navigation, and thus there are many considerations that must be weighed to determine whether such use unduly impairs navigation, and the relative advantages and disadvantages of any such use, as compared with the interests of navigation, must be taken into consideration.

Congress did not intend that such a question should be primarily decided by either the States or the citizen. In view of prior decisions, which, as to navigable waters which were wholly intrastate in character, held that, in respect to purely local facilities, the States might act, in the absence of Federal legislation, Congress evidently intended, by the Act of 1899, to remove this implication by asserting that, with respect to the navigable capacity of the waters of the United States, its failure to legislate should not be regarded as an implied authority to the States or to the citizens thereof to proceed to use the waters; but that the Federal Government should determine to what extent, if any, the navigable capacity of the water highways of the country might be affected.

This seems to me obvious, when the vagueness of the phrase: "navigable capacity" is taken into consideration; for the phrase is a relative one. Navigable capacity could be impaired for vessels of large draft, without impairing it for vessels of small draft. This requires a certain balancing of the economic equities of the situation, and the Federal Government preferred itself to

weigh these equities, and not permit the States or the citizens thereof to determine the advantages or disadvantages of any interference with navigable waters.

It was therefore necessary that, in some way, the question as to what interference would be permitted and what should be forbidden in any specific case should be determined by some one, and, as I have said, it was impossible for Congress to do so in all cases and at all times, as it would not be continuously in session.

I therefore interpret the latter part of the quoted statute as meaning that, within reasonable limits, Congress would delegate its power in the premises to the Chief of Engineers and the Secretary of War to determine—at least in the first instance—what interference with navigable waters could be permitted, until Congress should specifically act, and always subject thereto.

This policy of Congress was not a new policy, for it has found expression in much prior legislation. Thus, by the Act of March 3, 1869 (15 Stat. 336), Congress had provided, with respect to the proposed construction of a bridge between New York and Brooklyn—

> "That the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and in order to secure a compliance with these conditions the company, previous to commencing the construction of the bridge, shall submit to the secretary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act, not to obstruct, impair, or injuriously modify the navigation of the river.
>
> Sec. 2. And be it further enacted, That the sec-

retary of war is hereby authorized and directed, upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification, the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war."

Under this statute, the Secretary of War, upon the recommendation of the Chief of Engineers, approved the plan for the bridge, and it was subsequently contended that, as the bridge in fact impaired navigation of the river, the Secretary of War was without authority to permit it.

The Supreme Court, however, thus construed the Act of 1869:

(*Miller* v. *Mayer*, 109 U. S. 385.)

"It is contended by the plaintiff with much earnestness that the approval of the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary, Congress did not abdicate any of its au-

thority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

In my opinion, Congress had the same purpose in view in the Act of 1899. Having assumed paramount jurisdiction over all navigable waters and excluded the idea that any action of a State could legitimate an impairment thereof, and that any Federal assent thereto could be implied from Federal inaction, Congress proceeded to forbid the commencement of any such work, "unless the work has been recommended by the Chief of Engineers

and authorized by the Secretary of War, prior to beginning the same."

In my opinion, Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact, and if they were of opinion that the use of navigable waters, in a certain case, was not such an impairment of their navigability as to require the prohibition of Congress, then the construction was "affirmatively authorized by Congress," because the administrative agency, to which Congress had delegated the ascertainment of the facts, had found the fact to be that such use was not, for the time being, an impairment of navigable capacity, such as Congress intended to prohibit.

I am informed that, for a long period of years, it has been the practice of the War Department to issue permits under Section 10 of the Act of March 3, 1899, without requiring that the particular project be first authorized by special act of Congress, and that was the policy of the War Department in the specific case of the Sanitary District of Chicago.

The history of that prolonged controversy recognized an authority on the part of the Chief of Engineers and the Secretary of War to determine the facts of undue impairment in behalf of the Federal Government. The permits, which were given from time to time by the War Department, (the last of which permtited Chicago to divert water from Lake Michigan to the extent of 4,167 cubic feet per second), can only be explained on this theory; for, theoretically, the diversion of so great a volume of water affected the navigable capacity of the Great Lakes; but the legal question still remained whether, taking into consideration all of the economic factors—as, for example, the navigability of the Chicago

and Calumet Rivers, to the south, and the navigability of the Great Lakes, to the east—and having in mind the depth of the various channels and the natural use of waters for sanitary and other purposes, there was such an undue impairment of navigability as to require that one use of these waters be restricted to a given amount, in order to make another use more effective. Your predecessors, having in mind the various elements of an extremely complicated economic and sanitary problem, reach the conclusion that there could be—at least until Congress provided otherwise—a permit to use the amount indicated, but no more; and this could only proceed upon the theory that, while Congress had made a general prohibition of all impairment of navigable waters, it had delegated to the War Department the duty of deciding the degree of impairment which would bring a specific case within the general prohibiton.

Certainly the suit which the United States brought against the Sanitary District of Chicago proceeded on this theory; for the Government sought to restrain the Sanitary District from taking any waters in excess of 4,167 cubic feet per second. The suit was thus based upon the permits of the War Department and assumed its authority to grant them. The lower court granted an injunction which forbade a greater diversion of the waters than the amount permitted by the War Department, and the Supreme Court, on January 5, 1925, affirmed this decree, and expressly added that its affirmance was "without prejudice to any permit that may be issued by the Secretary of War, according to law."

If it be suggested that the words "according to law" destroy the force of the proviso, it can be answered that such a proviso, deliberately written by the Supreme Court in its decree of affirmance, cannot be disregarded as meaningless. The Supreme Court apparently con-

templated the possibility that it might be necessary, pending the final action of Congress and in order to prevent irreparable injury to life and property, to make some temporary provision, and its decree of affirmance sustaining a permit previously granted by the Secretary of War enforced an administrative decision of the Chief of Engineers and the Secretary of War, previously given under the authority of an Act of Congress, and as its instrument.

Unquestionably the War Department must take into account, in exercising its administrative discretion, the policy of Congress, as disclosed by the statute. The function of your department is to determine the facts, and not policies. In doing so, you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters.

The present diversion by the City of Chicago of more than the amount permitted is, under the general prohibition, not authorzed by Congress, because it has not been authorized by the administrative agency to which Congress delegated the power of determination; but it would be authorized by Congress—subject, of course, to any change in the law at any time by that body—if and when the Chief of Engineers and the Secretary of War determine that the interests of navigation—having in mind all the complicated circumstances—would not be unfairly prejudiced by a temporary use of the waters to the extent that the War Department, in its sound discretion and having in mind the general policy of Congress, sees fit to permit.

In exercising this political discretion, it seems to me that the War Department should do what it believes

Congress would wish it to do under the circumstances. As a President of the United States once said: "It is a condition, and not a theory, that confronts" the Federal Government. The condition is that a great city, with over three millions of inhabitants and with mighty industries situated within its boundaries, has built important works for the diversion of water from Lake Michigan, and is in fact diverting such waters, to an amount in excess of the amount permitted by your predecessor.

You may conclude, in the exercise of your discretion, that such a situation, which has developed in a period of thirty-five years, during which the City of Chicago has greatly added to its population, cannot be changed in a day.

In the exercise of such discretion, you may conclude that, under present circumstances, the Sanitary District of Chicago should be permitted to take a greater quantity of water than that authorized by previous permits, or required to take less. The previous permits given by your predecessors in this matter were expressly revocable in terms, and, even if this were not the case, their revocability would, in my judgment, be implied from the continuing duty of the United States to preserve the navigability of its water highways.

You are therefore at liberty, as the administrative agency of Congress, to determine, under the circumstances which now exist, to what extent, if any, Chicago may continue to divert the waters of Lake Michigan, and, if you reach the conclusion that a greater diversion of such waters by the city of Chicago may be temporarily permitted, to enable that city to comply with the law, you are authorized not only to make such permit revocable, in your discretion, but also to grant it upon such terms and conditions as, in your judgment will effectively pro-

tect the interests of navigation in these great interstate highways.

You may also conclude, in the exercise of the same discretion, that any permit that you may grant may be expressly made subject, at all times, to the action of Congress, whose representative you are in the matter and whose judgment, with or without such express reservation, is final as to the policy of the nation in the premises.

This view as to the nature of your powers seems to me a reasonable construction of the pertinent Acts of Congress. It is, in any event, the only construction that would prevent irreparable harm, and, therefore, presumably, it is a construction which Congress itself would favor; and I therefore so advise you

Very respectfully,

JAMES M. BECK,
Acting Attorney General.

Assistant and Chief Clerk,
Feb. 14, 1925.
War Dept.
P. S.

The Honorable,
The Secretary of War.